UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5
230 SOUTH DEARBORN ST
CHICAGO, ILLINOIS 60604

REPLY TO ATTENTION OF

May 31, 1984

MEMORANDUM

SUBJECT: Issuance of 106 CERCLA Order to Reilly Tar and Chemical Corporation

FROM: Robert B. Schaefer
Regional Counsel

TO: Courtney Price
Assistant Administrator for Enforcement and Compliance Monitoring

On Monday, June 4th, Lee Thomas has indicated that he will sign a Record of Decision (ROD) which will provide funding for the implementation of a drinking water treatment system for the City of St. Louis Park, Minnesota. The system is necessary to remove contaminants from the drinking water in an aquifer which was contaminated by the Reilly Tar and Chemical Corporation. The United States has an action pending in the Federal District Court for the District of Minnesota against Reilly Tar seeking mandatory injunctive relief and restitution pursuant to Section 7003 of RCRA and Sections 106 and 107 of CERCLA.

David Hird, the DOJ attorney assigned to the case, as well as Sharon Foote from OSWER have expressed a strong interest in the issuance of an administrative order to Reilly Tar pursuant to Section 106 of CERCLA, requiring the company to implement the drinking water system set forth in the ROD and to provide maintenance of the system for twenty five years. Deborah Woitte, of your staff, has concurred in this recommendation.

The purpose of this memorandum is to express my reservations regarding the issuance of Section 106 orders in filed actions generally and specifically in this case. I want to bring these concerns to your attention because, to my knowledge, no 106 order has previously been issued in a filed case with the exception of the Price case, where the Court itself encouraged such an order. Accordingly, before the Agency makes a policy determination regarding issuance of such orders in these circumstances, I believe it is important that you be

fully apprised.

My reservation concerning the issuance of such orders in the context of pending judicial proceedings is that in filed actions we have submitted the subject matter to the jurisdiction of the court. By taking administrative action, it is arguable that we are impinging on the court's jurisdiction. Depending on the judge, this independent Agency action on matters within his purview may have adverse consequences for the course of the litigation. I believe that the more appropriate action in filed cases is to seek an injunction from the court. The evidence necessary to support the issuance of an order should be sufficient to support a formal action in court.

Further, we can never presume that our administrative orders will not be challenged by the recipients. Accordingly, we must be prepared to put on our case and defend our action. To this end, when any administrative order is issued, there must be both an Agency and Department of Justice commitment of adequate resources. In many instances, those resources may be better spent on preparation of the actual case for trial than in peripheral defensive litigation.

Regarding the issuance of an order to Reilly Tar, I believe that such an action will not significantly advance the case. It is my understanding that DOJ believes that an order will be beneficial for two reasons. First, since we do not expect Reilly Tar to comply voluntarily with the order, we will have set the stage for obtaining treble damages. Secondly, both David Hird and Deborah Woitte believe that an order will move the case toward settlement both by showing the recipient our serious intentions with regard to the case and through the threat of treble damages. Further, it is DOJ's opinion that there is little liklihood of Reilly Tar challenging the order. Finally, DOJ believes that an injunction is inappropriate because they believe that once CERCLA monies are expended, we will not be able to support such an action.

We recognize the coercive impact of Section 106 orders generally. In this case, however, I am not persuaded that these are compelling reasons for issuing the order. First, I believe that it is unlikely that the court would award the Government treble damages under the circumstances of this case. Secondly, pursuit of an injunction would be even more effective in moving the parties toward settlement without potentially offending the court. Third, if Reilly Tar does challenge the order, it will either involve large resource commitments without significantly advancing the case, or it will require us to go to a hearing on certain issues before we are ready. Finally, although DOJ has stated that it believes we could succeed in ultimately enforcing the order, DOJ does not intend to seek enforcement of the order. Thus, issuance of the order will in all probability

neither conserve CERCLA monies, nor resolve any outstanding legal issues or improve our litigation posture.

For the reasons outlined above, I have reservations regarding the issuance of orders in filed cases and in this case in particular. If upon consideration of the concerns discussed above, you make a policy determination that issuance of orders in filed cases is appropriate under particular circumstances, I will nonetheless support that position. I recommend, however, that deference be given to the position of the litigation team in regard to this issue in each case, and especially that the affected U.S. Attorney's Office be consulted. Accordingly, the litigation team in the Reilly Tar case should prepare a thorough briefing paper on the issue setting forth the law in this area, the possible advantages and the possible drawbacks of issuing the order. Once this has been done, the Agency can make a reasoned determination on the issuance of an order in the Reilly case.

cc: Steven Ramsey